Letter of Advice[7] in which Lowry certified, *but understated*, his tonnage. When the Fund advised Lowry that his reported tonnage in 1955 and 1956 was grossly under what he had reported to others as his true tonnage and requested payment for tonnage not reported (P.A. 17), Lowry claimed the Fund was misinformed and that his payments were current (P.A. 22). Fund's request that Lowry's records be examined by an independent certified public or Fund accountants brought Lowry's proffer of settlement of the controversy for $5,000.00 (P.A. 23)—an offer rejected by Fund—but, significantly, Lowry did not disclaim the agreements.

Upon Lowry's failure to perform his obligation pursuant to the Agreements, Petitioners instituted action to recover a money judgment against him for the unpaid royalties. Lowry sought to avoid liability on the ground that the agreements were executed "as a sham" and that there was agreement with a UMW representative that the agreements "would never become effective" (D.A. 30).[8]

Petitioners moved for summary judgment (P.A. 6) under Rule 56, Federal Rules of Civil Procedure,

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[7] There were 25 Check Letters of Advice received from Lowry. All are in the original record on file in the Fourth Circuit. For brevity purposes and to comply with that Court's rulings, counsel printed one of such letters (P.A. 25).

[8] Lowry also asserted the defense of duress based upon his affidavit statement that a long history of violence against non-union operators by UMW "carries with it the implied threat" of resultant injury to coal operators, their property and employees who attempt to work contrary to UMW's wishes (D.A. 31). This defense was rejected by the district court (D.A. 36) and the dissent agreed (A. 12a). The majority did not reverse the district court on this issue.

asserting "the pleadings, interrogatories and depositions filed . . . and the affidavits and exhibits attached" to the motion "show there is no genuine issue as to any material fact" and that Petitioners "are entitled to judgment as a matter of law". Lowry, in turn, filed an affidavit (D.A. 29-32) which, though containing *all facts* upon which he relies to support his legal defenses allegedly voiding the executed agreements, did not contradict any factual recitals in Petitioners' affidavits and exhibits.

According to Lowry, he signed the 1952 Agreement when a UMW representative, in the presence of three employees, presented the contract to him for signature but only after his telling the union representative he "couldn't pay and operate under the contract" and the representative telling him that signing the agreement "would get them off his neck" and for Lowry "to pay whatever I could" (D.A. 17-8). Lowry admits he was aware of the contract's terms and that there were no threats made to him or his employees and no picket line was established at Lowry's operation (D.A. 19).

On the occasions when the same union representative presented the 1955 Agreement and the 1956 Agreement to him, Lowry related there were no threats and no conversation but "Just a meeting or a matter of obtaining a contract and signing it" (D.A. 20-2, 23, 31).

The district court's opinion (D.A. 33-7) rejected Lowry's "sham" contract defense, declaring "Such a defense would do violence to the requirement of the National Labor Relations Act giving either party the right to request a written agreement embracing the entire agreement of the parties" and "Moreover, such a defense would open the door to varying solemn writ-

ten contracts by prior oral agreements and would do much toward tearing down our basic acceptance of the strength and importance to be given to written agreements" (D.A. 36).[9]

The district court, being of opinion, "that there is no material fact upon which reasonable minds could differ or from which varying inferences could be drawn", and under the compelling language of Rule 56(c), Federal Rules, it granted Petitioners' summary judgment motion (D.A. 37) and by judgment order of November 7, 1960, ordered that Petitioners recover of Lowry $49,531.40 plus interest and costs (D.A. 32-3). Lowry appealed.

B. The Fourth Circuit's Majority Opinion and the Dissent of Chief Judge Sobeloff

While the Fourth Circuit's majority did not challenge the district court's finding that "there is no material fact upon which reasonable minds could differ or from which varying inferences could be drawn", it nevertheless reversed the district court's judgment and remanded the case for further proceedings consistent with the majority's opinion, declaring "We think the summary judgment inappropriate in the light of the factual issues tendered" (A. 1a). And, though Lowry did not contend in either of the lower courts he had other facts to present, the majority declared "the factual situation should be more fully developed" and "On the present record we think the facts are not sufficiently established to determine whether the situation is governed by the rule which

[9] In the trial court Petitioners asserted that the doctrine of ratification required judgment against Lowry. The district court agreed (D.A. 36-7).

denies enforcement of pretensive agreements or by the rule which forecloses the use of parol evidence to establish a contemporaneous oral agreement to vary the terms of a valid contract" (A. 3a, 4a).

Dissenting, Chief Judge Sobeloff regarded the district court's action "sound" and the remand merely to establish a "legal irrelevancy" (A. 6a). The crucial difference between the two opinions lies in the majority's refusal to adopt Trustees' contention that national labor policy forecloses the right of an operator signatory to an industry-wide labor agreement, containing an irrevocable trust for benefit of employees, from varying its terms and evading his obligations to the trust on the ground that the written agreement was a "sham" or pretensive agreement.

The dissent challenges the majority opinion on three grounds.[10]

First, the majority shows no concern for Section 302(c) or its purpose and is satisfied to regard the instant case as one unrelated thereto or to its impact upon employees in an industry-wide situation. The dissent rejects the majority's analogy of this case to the majority's supposititious "April Fool's Day" agreement (A. 5a) and, noting this case presents no such joke, emphasizes "this is not just a small case involving a few coal miners" and "If the present employer is permitted to circumvent his written collective bargaining agreement, the effects will be industry

[10] While the dissent points to the factual recitals upon which Trustees based their claim of ratification (A. 6a-7a), which the district court sustained (D.A. 36-7), Chief Judge Sobeloff bases his dissent "upon broader grounds" (A. 7a), which reflect national labor policy.

wide" and, significantly, it points to ten other cases[11] where signatories have attempted to "renege on their agreed-upon obligations" with respect to the Fund, noting one in which an operator was successful (A. 7a).[12]

The dissent is unwilling to treat the instant irrevocable trust in an industry-wide labor contract, created pursuant to Section 302(c) which, safeguarding employees, requires welfare benefits be detailed in writing as one unrelated to that statute. The dissent gives concern, too, to Congress' purpose in protecting such employees concerning their rights to welfare benefits and in assuring them of the availability of trust funds in periods of their unemployment, illness, old age and death, which may be achieved, the dissent urges, only by requiring the obligation to pay royalties be in writing. If publicly declared written agreements may be "sapped by a secret compact", then, poses the dissent, such protection and assurances are rendered abortive (A. 8a-9a). Further, in an industry-wide agreement, all operators signatories have a right to know if some are paying less royalties than others. (A. 9a).

Secondly, the dissent proclaims that as a matter of substantive labor law, courts should not permit the "sham" exception; that regard must be had for the spirit of the Act's Section 8(d) mandate that a labor

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[11] Such cases are listed and cited in the dissenting opinion (A. 7a, fn. 1). Significantly one of the one cases is the Fourth Circuit's *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427, discussed (*post*, p. 16) as being in direct conflict with the instant case.

[12] The case noted is Lewis v. Mears, DC, W.D., Pa., 1960, 189 F. Supp. 503, aff'd. 3 Cir., ... F. 2d ....., October 11, 1961, rehearing filed November 13, 1961, 48 LRRM 3120.

contract be in writing if requested by either party; that a bargaining agreement is a code for the industry to which it applies and the union bargains, not for itself alone, but as employees' representatives and, in this case, for Trustees; that employees and the public alike have a right to know the terms of the "real" agreement; and if written agreements may be nullified by secret oral agreement, "the purpose of the contract as an instrument of industrial peace may be frustrated" (A. 10a-11a). The majority finds "no such broad and collateral effect" thereof and that the statutory requirement of written agreements is directed toward protecting the "real agreement" and "not to alteration of accepted principles governing proof of the real agreement" (A. 5a).

Thirdly, the majority thesis that Trustees' rights are derivative ones "as third party beneficiaries of the real agreement" is rejected by the dissent (A. 5a), which argues that even if the sub-rosa understanding could be asserted against the union, to allow the defense against the instant trust, sponsored jointly by labor and industry and approved by Congress, would undermine the statutory scheme for creating irrevocable trusts for employees; that the Fund is not union property (Lewis v. Benedict Coal Corp., 361 U.S. 459, 465); and it would be at war with the statutory policy to permit a trust fund to be eroded by clandestine arrangements between an employer and union, asking "what kind of trust is it that leaves the door open to impairment by secret agreements, even those participated in by a donor?" (A. 11a-12a)[12a]

[12a] The district court rejected Lowry's duress defense (*ante*, p. 6, fn. 8). The dissent regarded it as "frivolous", declaring there is no necessity to take testimony thereon (A. 12a).

REASONS FOR GRANTING THE WRIT

I.

The Fourth Circuit has decided a federal question, important in the processing of collective bargaining agreements and in the Act's administration as it concerns both industry-wide bargaining agreements and irrevocable industrial trusts for employees in a manner which frustrates rather than promotes industrial stabilization through collective bargaining agreements and in conflict with the purposes, spirit and language of Congress in enacting the Act's Section 8(d) and Section 302(c)(5), and at variance with the national labor policy expressed by this Court in *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514, and in *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, and by the Sixth Circuit in *Gatliff Coal Co.* v. *Cox*, 6 Cir., 152 F. 2d 52 affirming *Cox* v. *Gatliff Coal Co.*, DC, E.D. Ky., 1945, 59 F. Supp. 882; and it is in direct conflict with the Fourth Circuit's *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427, which results in the question being in a confused and uncertain state not only as between the Fourth and Sixth Circuits but even in the Fourth Circuit itself.

II.

Though the case is remanded for further proceedings, there is an important issue of law which is fundamental to the further conduct thereof and, as noted, on which there is a conflict. Under these circumstances, this Court has held that certiorari is available, even though the judgment to be reviewed is non-final. *United States* v. *General Motors Corp.*, 323 U.S. 373, 374, 377.

III.

Clearly, the question presented is of importance in the administration of the Act as it relates both to

the processing of bargaining agreements and industrial trust funds since the irrevocable trust for which Trustees seek to recover the royalties is one created pursuant to the Act's Section 302(c) and is contained in an industry-wide collective bargaining agreement. The dissent's admonition is meaningful when it observes that "*this is not just a small case involving a few coal miners*" and "*If the present employer is permitted to circumvent his written collective bargaining agreement, the effects will be industry wide* (A. 7a). As the dissent indicates (A. 7a), Lowry's efforts to erode the Fund do not stand alone, for in at least ten other instances have operators signatory to the Agreement sought "to renege on their agreed-upon obligations".[13]

Indeed, the impact will be even more expansive than the dissent suggests, for Lowry's pattern of avoiding his written obligation, upon which the Fourth Circuit's majority has placed its imprimatur, may well become the device and weapon for use by employers in all other industries to destroy employee confidence in the processes of collective bargaining and thereby to frustrate congressionally-expressed national policy of eradicating industrial strife through the medium of written collective bargaining agreements. Clearly, the rule of law which the Fourth Circuit endorses in this case, which renders instable and uncertain bargaining contracts, is antithetical to the spirit, the purpose, and the language of the Act's Sections 8(d) and 302(c)(5). As the Fourth Circuit's majority opinion affects the instant case, the dissent poses it succinctly and aptly by its query: "what kind of trust is it that leaves the door open to impairment by secret agreements, even those participated in by a donor?" (R. 18; A. 11a).

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[13] These cases are listed in the dissent (A. 7a). Unless otherwise indicated, all emphasis herein are supplied.

IV.

The three reasons assigned by Chief Judge Sobeloff for his differences with the Fourth Circuit's majority are consonant with the Act's spirit, purpose and language and with the decisional law already noted. The majority opinion collides therewith and is erroneous.

The original National Labor Relations Act (the "Wagner Act") was relatively new when this Court noted its preference for written collective bargaining agreements as "Contrasted with the unilateral statement by the employer of his labor policy" and mandated that agreements reached by bargaining negotiators be reduced to writing "as a permanent memorial" and "an authentic record" of its terms, not only to evidence the employer's good faith but as "the final step in the bargaining process" and because, significantly, "the signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife". *H. J. Heinz Co.* v. *NLRB,* 311 U.S. 514, 523-4, 525.

Pointing to *Heinz*, the Sixth Circuit in *Gatliff Coal Co.* v. *Cox*, 6 Cir., 152 F.2d 52, 56, sanctioned a district court's declarations that national labor policy demanded that collective bargaining agreements be accorded "a more secure and stable position in our National economy than that of ordinary common law contracts which may be altered at pleasure" and that the "National Labor Relations Act clearly precludes defendant's reliance upon the prior or contemporaneous oral agreement upon which its defense . . . is based." *Cox* v. *Gatliff Coal Co.*, DC, E.D. Ky., 1945, 59 F. Supp. 882, 886.

Statutory accord with national labor policy as expressed in *Heinz* is found in Congress' enactment of Section 8(d) [29 USCA 158(d)], which requires, as an element of good faith bargaining, "the execution of a written contract incorporating any agreement reached if requested by either party." (A. 14a). On at least three occasions since Congress adopted Section 8(d), this Court has recognized the pertinency of national labor policy in interpreting and implementing collective bargaining agreements. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448; *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459; *and United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578.

Indeed, the Fourth Circuit's declarations that it finds "no such broad and collateral effect of the statutory provision" and that the statutory requirement "is directed to the real agreement of the parties" but "does not make sacrosanct a pretensive agreement inconsistent with the real agreement reached in the collective bargaining process" (A. 4a) are at odds not only with the teaching of *Lincoln Mills, Benedict* and *Warrior* that the interpretation and implementation of bargaining agreements must be accommodative to national labor policy but also with this Court's enunciation in *Warrior* that the collective agreement "calls into being a new common law—the common law of a particular industry" (363 U.S. 579) which, in the instant case, is the bituminous coal industry.

It is plain from the majority's result it was unwilling to regard the instant bargaining agreement as a "generalized code" for the bituminous coal industry. Such unwillingness is consistent with the majority's disregard for the dissent's reminder, harmonious with *Lewis*

v. *Benedict Coal Corp.*, 361 U.S. 459, 468, that the union, in addition to bargaining for itself, bargained also for employees and the Trustees, and that these interests, as well as the public, are entitled to know from a written agreement what are the contract's real terms. The same unwillingness to accord to collective bargaining agreements the protection of federal labor policy explains the majority's indifference to the dissent's further argument that "If such written contracts can be nullified whenever the employer and the union come to some other secret oral agreement, the purpose of the contract as an instrument of industrial peace may be frustrated" (A. 11a).

The majority opinion's discordance with national labor policy stands in sharp contrast to its concern therefor in 1958 when, in *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427, it affirmed a district court holding which rejected a coal operator's contention that he signed the same industry-wide agreement herein involved merely as a "formality" and that a union representative had told him he need pay only such royalties as he could. *Lewis* v. *Mearns*, DC, N.D. W. Va., 1958, 168 F. Supp. 134. The dissent's insistence in the case at bar that remand establishes only a "legal irrelevancy" accords with the district court's appraisal in *Mearns* that the oral testimony "At most" shows "only a prior or contemporaneous oral agreement which he is barred from introducing here to vary the terms of the written contract by the parol evidence rule" (168 F. Supp. 138), and continuing,

> "In addition, the written agreement here was the final step in a collective bargaining process, under Section 8(d) of the . . . Act. . . . It has been held that parties to such contracts are precluded by the

> Taft-Hartley Act from relying upon prior or contemporaneous oral agreements. Gatliff Coal Co. v. Cox, 6 Cir., 152 F. 2d 52."

The Fourth Circuit, in a per curiam opinion in *Mearns*, adopted the "District Court's opinion which fully discusses the facts and the law" (268 F. 2d 428).

When *Mearns* is compared with the majority's *Lowry* (the instant case), it is clear that Fourth Circuit cases are at odds with each other; yet both Chief Judge Sobeloff and Judge Haynsworth, who wrote the majority opinion in *Lowry*, participated in *Mearns* and both agreed, as the district court opinion stated, the Act and parol evidence rule alike bar admission of a pretensive agreement to vary the terms of this industry-wide bargaining contract. Judge Haynsworth's *Lowry* majority opinion noticeably avoids mention of *Mearns* even though the dissent points to it.

Thus, not only is there a conflict between the majority opinion and rationale of national labor policy in other cases, herein discussed, but the applicable rule in the Fourth Circuit itself, by its majority opinion, is beclouded and uncertain.

The dissent's second ground for challenge of the majority's opinion, evincing clearly its error, relates to the Act's Section 302(c). Though this statute expresses the conditions under which Congress authorized agreements establishing industrial trust funds, and despite the dissent's emphasis thereon, the majority opinion ignores it, significantly failing to explain its lack of pertinency to the instant situation.

The dissent, regarding the statute as an assurance that employees are knowledgeable as to welfare benefits to which they are entitled, notes Section 302(c)(5)

(B) required "the detailed basis on which such payments are to be made" must be "specified in a written agreement with the employer" (A. 8a) and appropriately observes such protection is incomplete, unless "the statute is read to require as well that the terms on which payments are to be made into the Trust Fund be similarly stated in writing". Since, as the dissent borrows from *Benedict* (361 U.S. 469), royalty payments are an indirect method of compensating employees, unless reliance may be had upon the written agreement, employees are "deceived if the publicly declared, written agreement may be sapped by a secret compact" (A. 9a). In *Benedict*, too, this Court speaking of the same national labor contract, observed "this is an industry-wide agreement involving many promisors" (361 U.S. 469), which reflects the merit in the dissent's observation that written delineation of royalty payments is necessary to employers in an industry-wide bargaining situation, to enable them to know "when someone is paying less" royalty than others. Pertinently, the dissent notes that if one signing a written agreement may be permitted to say, "Yes, we have obediently put it in writing, but we did not mean it", then the scheme of financial aid and security to employees from welfare funds for problems of unemployment, illness, old age and death "could be reduced to chaos by a succession of such defenses" as Lowry relies upon herein, "bringing in its train a host of social evils". (A. 9a)

The majority holding that a signatory may be absolved of his written obligation to pay royalties to the trust fund by oral proof that the agreement was merely pretensive is at war with, and a glaring departure, from this Court's recognition in Benedict (361 U.S.

468-9) that a signatory to the industry-wide coal agreement "entered into a long-term relationship" and assumed responsibility for the Fund's soundness and its management.

As a third and final point of disagreement, the dissent avows, and the majority denies, that even if an oral agreement, said to be the "real contract", could be relied upon by Lowry in a suit by UMW, it could not be asserted as against the Trustees (A. 11a).

Without regard that Trustees' rights and Lowry's obligations are contained in an irrevocable trust, created pursuant to Section 302(c) in a bargaining agreement for employees in an entire industry, and despite this Court's holding in *Benedict* that "This collective bargaining agreement . . . is not a typical third-party beneficiary contract" (361 U.S. 459, 468), and contrary thereto, the majority opinion argues that Trustees' rights, being derivative, depend "upon the real agreement between the operator and the union" as third party beneficiaries (A. 5a). Appropriately the dissent points to this Court's holding in *Benedict* (361 U.S. 465) that the trust fund "is in no way an asset or property of the union" but is so independent of the union that a signatory employer was not permitted to use a money judgment against the union as a set-off to a judgment against the employer in Trustees' favor (A. 11a-12a). Logically, and with substance, the dissent declares (A. 12a), "The Trust Fund's obligation to pay benefits to Lowry's employees could not be affected by secret understandings between the coal company and the union; neither may the employer's obligation to pay royalties to the Trustees be diminished by clandestine arrangements between the employer and the union".

Benedict emphasized that the trust created in this industry-wide agreement was to provide security for employees and their families (361 U.S. 468). The grossness of the Fourth Circuit's error is manifest by its utter unconcern and lack of consideration for these ultimate beneficiaries. Actually, the majority opinion effectuates a burden that must be imposed in final analysis upon employees as the Fund's ultimate beneficiaries, innocent of any wrongdoing, who produced the coal from which flows Lowry's obligation to pay the royalty upon such production. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 466. The dissent aptly argues that a trust which may be impaired by secret agreements is "at war with the law's underlying policy". Even if Lowry could be regarded as innocent of wrongdoing, which Trustees deny, as between himself and Trustees (who stand in the shoes of employees as the ultimate beneficiaries, *U. S.* v. *Carter*, 353 U.S. 210, 220), *Lowry* is subject to the rule that when one of two innocent parties must suffer by the act of a third person, he, who by his act has enabled such third person to cause the loss, must sustain it. *Eliason* v. *Wilborn*, 281 U.S. 457; *Farmers Nat. Bank & Trust Co.* v. *Flexible Truck Corp.*, 3 Cir., 81 F. 2d 541; *NLRB* v. *Industrial Cotton Mills*, 4 Cir., 208 F. 2d 87, 91.[14]

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[14] In a footnote the majority observes that "One can imagine circumstances in which a pretensive agreement between the union and a mine operator might induce action by the Trustees or employees to their detriment . . . No such circumstances are developed on this record." (A. 6a, fn. 5). The dissent responds that "The simple answer is that . . . detriment is inherent in the frustration of Trustees' and employees' rights . . ." (A. 11a). Further, Trustees submit it is difficult to understand the majority's statement in light of the uncontroverted facts appearing herein on the issue of ratification, which are summarized in the dissent (A. 6a).

Further, the majority's preference of the pretensive contract rule over national labor policy invites the textual recitals found in Wigmore on Evidence, 3d Ed., Vol. IX, p. 16:

> "When the document is to serve the purpose of mere sham, this principle in strictness exonerates the makers. But a just policy would seem to concede this only when the pretense is a morally justifiable one (as, to calm a lunatic or to console a dying person). When it is *morally beyond sanction*, or aims at *an evasion of the law*, or *a deception of other persons*, by intention of the parties, that intention will not be given effect . . ."[15]

CONCLUSION

For the foregoing reasons, Petitioners pray that this Petition for Writ of Certiorari should be granted and that such a Writ issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit entered in said Case No. 8298 on September 16, 1961, as aforesaid.

Respectfully submitted,

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[15] The emphasis placed upon the words "*a deception of other persons*" is supplied. The other italicized words are those of the author.